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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of the Alliance for Public Technology	)	
Requesting Issuance of Notice of Inquiry And	)	RM-9244
Notice of Proposed Rulemaking to Implement	)	File No. CCB/CPD 98-15
Section 706 of the 1996	)	
Telecommunications Act	)	

REPLY COMMENTS OF MCI TELECOMMUNICATIONS CORPORATION

MCI TELECOMMUNICATIONS CORPORATION

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MCI Telecommunications Corporation (MCI), hereby submits its reply in response to comments filed in the above-captioned proceeding.

I. INTRODUCTION AND SUMMARY

As MCI stated in its initial comments, it supports a Commission effort undertaken pursuant to section 706(a), to facilitate the development and deployment of advanced capabilities to all Americans. MCI supports fully the Commission's issuance of a Notice of Inquiry (NOI) to create a comprehensive record regarding the state of advanced capabilities. Further, MCI believes that the resulting record will show that the best way to further the goals of section 706 is to enforce the requirements of section 251(c) with respect to CLEC access to xDSL-conditioned loops, xDSL-equipped loops, collocation, subloop unbundling and resale. MCI, however, disagrees not only with the Alliance for Public Technology's (APT) approach,[1] but also strongly

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[1] See also, Petition of Ameritech Corporation to Remove Barriers to Investment in Advanced Telecommunications Capability, CC Docket No, 98-32 (filed March 5, 1998) (Ameritech Petition); Petition of Bell Atlantic Corporation for Relief from Barriers to Deployment of Advanced Telecommunications Services, CC Docket No. 98-11 (filed January 26, 1998) (Bell Atlantic Petition); Petition of US WEST Communications, Inc. for Relief to Deployment of Advanced Telecommunications Services, CC Docket No. 98-26 (filed February

disagrees with the approach of the Bell Operating Companies (BOCs) that filed in support of APT's petition. Contrary to the arguments implicit in APT's and the BOCs' comments, section 706 was not enacted as a special regulatory forbearance provision to ensure that the BOCs deploy advanced capabilities at the expense of competition in the local market. Rather, section 706 was enacted to ensure that ***all*** entities in the telecommunications marketplace will have the ability to deploy such advanced telecommunications capabilities in a fully competitive market.[2] Accordingly, any measures taken that encourage BOC deployment of advanced capabilities should not undermine the broader competitive goals of the Act.

Moreover, MCI believes that APT's request for rulemaking is premature. Section 706 is not designed to afford any segment of the industry a competitive advantage, which is precisely what the APT and the BOCs seek. Rather than view section 706 as an opportunity to afford full-scale regulatory forbearance for the BOCs' benefit, the Commission should utilize its panoply of regulatory tools and other measures to promote competition in the local marketplace.

Importantly, section 706(a) requires the Commission to encourage the deployment of advanced capabilities in a manner consistent with the public interest, utilizing measures that promote competition in the local market. 47 U.S.C. § 706(a). Although section 706 is not an independent source of authority for the Commission, it can further the goals of section 706 under its existing authority. Indeed, continued enforcement of section 251's unbundling, pricing and

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25, 1998) (US West Petition) (referred to collectively as "BOC 706 Petitions").

[2] As Chairman Kennard recently stated, section 706 is "intended to promote the deployment of advanced telecommunications infrastructure to all American." See William E. Kennard, Chairman, Federal Communications Commission, Remarks to USTA's "Inside Washington Telecom" at 3 (April 27, 1998) (Kennard Speech).

resale requirements will promote local competition, which will spur innovation and widespread deployment of advanced services.

APT and the BOCs have not shown that the deployment of advanced capabilities has been stymied due to the requirements under sections 251 or 271. It is evident that the BOCs are looking for ways to circumvent the Act's procompetitive provisions. We see no reason for the Commission to commence a rulemaking with respect to section 706 and advanced capabilities at this time. The inquiry required under the Act should suffice for gathering information and making a determination about the extent of deployment for advanced capabilities.

The central issue affecting advanced capabilities is the lack of competition with respect to the local loop.[3] There is little dispute that access to the local loop is critical for CLECs to compete against ILECs in providing local voice and advanced services.[4] Once the Commission initiates its investigation into the deployment of advanced capabilities, it should concentrate on whether the BOCs are complying with section 251(c), which would allow new entrants to provide xDSL, ISDN and other advanced services and capabilities. The best way to further the policy goals of section 706 is to enforce subloop unbundling, pricing, and other 251 requirements. In proceeding with its anticipated NOI, the Commission should undertake with

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[3] See, e.g., Opposition of MCI Telecommunications Corporation, CC Docket No. 98-32 at 12-17 (filed April 6, 1998).

[4] As Chairman Kennard stated, the Commission must be " . . . confident all competitors will have the same quality of access to the existing copper loops owned by the incumbents . . .;" Kennard Speech at 4; similarly, Commissioner Tristani stated that "[l]oop management [is] an area where competitors will be fairly reliant on the incumbent." Gloria Tristani, Commissioner, Federal Communications Commission, Remarks of Commissioner Gloria Tristani before the U S WEST Regional Oversight Committee, a 3 (April 27, 1998).

great deliberation and consideration the consequences of any actions taken thereunder. Regulatory forbearance, or any limitations on the enforcement of section 251 and other BOC requirements, is not in the public interest now or in the near future.

II. THE COMMISSION SHOULD ISSUE A NOTICE OF INQUIRY RATHER THAN A RULEMAKING

Rather than view section 706 as an opportunity to afford full-scale regulatory forbearance for the BOCs' benefit, the Commission should utilize its panoply of regulatory tools to help foster competition in the local marketplace. In encouraging regulatory forbearance, APT and the BOCs begin with the erroneous conclusion that widespread deployment of advanced capabilities has not occurred. However, only after -- and if -- the Commission determines that insufficient deployment has occurred should it issue a notice of proposed rulemaking in accordance with section 706.

Petitioners' requests for relief are inappropriate. They would prefer to have the Commission ignore implementation of procompetitive provisions of the Act that were enacted to ensure competition in the local market. Forbearance from regulations designed to increase competition in the telecommunications market, however, will not result in deployment of advanced capabilities. Regulatory forbearance is only appropriate in competitive markets as Congress has already determined.[5] It is clear that despite the Act's goals the local market is not open to competition. Once local competition is firmly established, widespread deployment of new technologies and advanced telecommunications capability will flourish.

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[5] Section 10(d) prohibits forbearance from the application of the requirements of sections 251(c) and 271 until those requirements have been implemented fully.

Indeed, it would be backwards for the Commission to grant the BOCs' pending requests for regulatory forbearance[6] before obtaining the results of its required inquiry or establishing the parameters by which it will seek to facilitate widespread deployment of advanced capabilities. There is little reason to believe that any Commission action that prematurely deregulates the BOCs will help foster either the goals of section 706 or the broader goals of the Act. Unsubstantiated and premature action will only serve to reinforce the already substantial barriers that deny competitive entry in the local market.

Furthermore, contrary to the petitioners' contention, deployment of advanced capabilities need not be delayed pending the Commission's inquiry.[7] Although the BOCs claim that prolonged action on their pending petitions will deprive consumers of the benefits of advanced capabilities, the Commission has several avenues through which to further the policy objectives of section 706. Moreover, with the exception of the requested interLATA relief, there is nothing prohibiting the BOCs from pursuing the deployment of the technologies that they assert they want to deploy.

The Commission is able to further the goals of section 706 under its existing authority. As discussed in greater detail below, continued enforcement of section 251's unbundling, pricing and resale requirements will promote local competition, which will spur innovation and the widespread deployment of advanced capabilities. In addition, the Commission can promote deployment of advanced capabilities in the context of reviewing section 271 applications filed by

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[6] See Comments of the National Association of Regulatory Utility Commissioners, CC Docket Nos. 98-11, 98-26, 98-32 at 4 (filed April 6, 1998).

[7] See, e.g., United States Telephone Association (USTA) Comments at 11-17.

the BOCs. Access to the BOCs' local loops, for example, is critical for the provision of local services to customers, both advanced and traditional voice services. Given the critical nature of access to unbundled local loops and other elements, the Commission should assess whether the BOCs are making such network elements available to competitors at forward-looking, cost-based rates.

III. THE COMMISSION SHOULD CONTINUE TO PROMOTE COMPETITION AND INNOVATION IN THE REALM OF ADVANCED SERVICES AND CAPABILITIES

The thrust of petitioners' comments is that, with regulatory forbearance, the BOCs will have the necessary incentive to innovate. APT and the BOCs base their comments on a faulty assumption. First, the BOCs argue that they would develop advanced telecommunications capabilities but for the stringent procompetitive provisions of the Act contained in sections 251(c) and 271. As MCI stated in its Comments, innovation in the telecommunications arena has traditionally resulted from a competitive marketplace -- and has not been due to the ILECs' willingness to invest in innovative services and capabilities. Competition in the marketplace will lead to more rapid innovation because carriers will have the natural incentive to distinguish themselves from competing carriers by bringing new and innovative services and capabilities to the market. In the end, this incentive would accelerate the technology development cycle, foster competition and reduce costs to service providers and customers.

Telecommunications policy in the United States is at a critical juncture, particularly with respect to facilitating local competition. Many of the commentors that support APT's petition argue that the Commission should provide regulatory relief to the BOCs to ensure the reasonable

and timely deployment of advanced services and capabilities.[8] This is wrong. Only after local competition is firmly established will the widespread deployment of new technologies and advanced telecommunications follow. Any Commission action that limits competition between ILECs and CLECs would subvert federal telecommunications policy by deterring, rather than encouraging, innovation. For example, the BOCs must not be permitted to prohibit innovative competitors from purchasing unbundled xDSL-conditioned loops, or local loops capable of providing voice and enhanced services or loops and xDSL equipment. Any Commission action that facilitates such a result would interfere with the "user-driven innovation" paradigm that is characteristic of the information economy, resulting in diminished technological growth and reduced consumer choice, and creating unfair advantages such that the BOCs will be able to exercise unchecked control over the direction and development of advanced telecommunications.

Even more compelling, no single segment of an industry should have the ability to control and direct the future of advanced technologies. The Commission should not take any action that would undermine its recent policy direction where innovation is the product of the experimentation of both end users and product developers. Rapid growth and vibrant competition are factors that create the greatest number of options for user experimentation in the advanced technologies marketplace, creating a unique economy and unpredictable atmosphere. Although it is impossible to predict which technology will become the market favorite, any action that limits market choices will lead to an easily predictable result: a stagnant market held hostage by the monopolist BOCs' lack of user friendly innovation.

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[8] See, e.g., US West Comments; see also BellSouth Comments; see also Ameritech Comments.

To ensure that customers have access to the broadest opportunities, the Commission must not prematurely deregulate monopolists, which would only ensure the maintenance of a bottleneck that will deny competitive entry. Without being required to provide widespread access to the networks, that bottleneck will become more intractable and incumbents will have little or no incentive to innovate in their own networks.

IV. THE ACT AND THE PUBLIC INTEREST REQUIRE CONTINUED PROTECTION AGAINST MISUSE OF BOC LOCAL MONOPOLY POWER

As stated in MCI Comments, the Commission's actions pursuant to section 706 must be consistent with the public interest. In proceeding with its anticipated notice of inquiry, the Commission should consider the consequences of any actions taken thereunder. Regulatory forbearance, or any limitations on the enforcement of section 251 and other BOC requirements, is not in the public interest now or in the near future.

A. Application of Section 251(c) to Advanced Technologies and Capabilities Will Result in Competition and Innovation

The Commission should reject as preposterous the argument by APT and the BOCs that section 251(c) should only apply to the BOCs' existing network.[9] Moreover, Congress could not have intended on the one hand to create competition in the market only on the other hand to impede it by eliminating the unbundling requirements for advanced capabilities. Such a restriction on the application of section 251(c) would have the effect of permitting the BOCs to

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[9] See USTA Comments at 17; see also US West Comments at 3; see also BellSouth Comments at 5.

exclude competitive access to their facilities.[10] The purpose of the Act is to ensure that competing carriers have nondiscriminatory access to the facilities that BOCs provide to themselves. Petitioners' proposal to limit section 251(c) to their existing network and not advanced capabilities, however, will frustrate rather than facilitate deployment of advanced services.

MCI strongly disagrees with the BOCs' claim that section 251(c) is "silent" on whether it applies to the ILECs' existing network at the time the Act became effective or applies to new network technologies as they are deployed.[11] There is nothing in section 251(c) that limits its application to particular facilities or to any point in time. Indeed, such a limitation would negate the purpose of the Act in facilitating local competition. Section 251(c) applies to the BOCs' facilities, not because of CLEC use, but because the BOCs have a monopoly over facilities for which there is no alternative. The local loop is the primary connection between subscribers and competitive providers of local and advanced services, and is controlled by the ILECs in their respective regions. Local voice and advanced data services are provided to the customer over the same facilities. Competitive providers need access to unbundled local loops for the provision of advanced services as much as they need them for the provision of voice services.

Contrary to what BellSouth may believe, the Commission is not "free to interpret section 251(c) in any manner that will promote the policy goals stated in section 706."[12] As APT

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[10] See APT Petition at 15 (seeking to limit the application of section 251(c) to the BOCs' "existing network").

[11] See BellSouth Comments at 5.

[12] Id.

acknowledged, the Commission cannot forbear from the application of section 251(c), which the Commission has already concluded applies to local loops conditioned to provide voice and other services such as xDSL-based services.[13] To that end, any offer of advanced capability should be subject to the same requirements of unbundling and pricing as the analog local network until such time as the BOCs' are no longer capable of leveraging their current market power.

Amazingly, APT and the BOCs blame the Commission for erecting regulatory barriers to infrastructure investment for advanced telecommunications capabilities,[14] when it is the BOCs that have been attempting to litigate their way out of every procompetitive provision of the Act or the Commission's rules. The Commission cannot begin to consider forbearance before section 251(c) is fully implemented, which will not happen until the BOCs stop litigating and start complying with the Act and the Commission's rules.[15]

B. The Commission Should Not Set a Sunset Date for the UNE/TELRIC Scheme

It is premature for the Commission to consider phasing out or forbearing from implementing any provision of the Act, especially section 251.[16] Section 10(d) permits the Commission to forbear from enforcing section 251(c) only after it has been fully implemented. Therefore, the Commission should not try to hazard a guess as to when conditions in the local

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[13] Local Competition Order, ¶ 380.

[14] See BellSouth Comments at 2; see also USTA Comments at 5-6; see also US West Comments at 3.

[15] See e.g., BellSouth Comments at 4 ("The ILECs have absolutely no choice but to litigate these issues to the end.").

[16] See BellSouth Comments at 8; see also Ameritech Comments at 6; see also GTE Comments at 4; see also US West Comments at 7.

market will be sufficiently competitive to warrant forbearance.

As MCI demonstrated in its Comments, section 10(d) already gives the Commission guidance on when it should forbear from section 251(c) requirements -- when the transition from monopoly to competitive conditions in the local market has been made. Given the BOCs' staunch resistance to complying with the Act, the local market will not be fully competitive in the near future. Further, a definite sunset date would give the BOCs clear incentives to impede both competition in the local market and the development of advanced capabilities. For example, if a BOC knows that a provision relating to unbundling of xDSL-related UNEs will sunset, that gives the BOC an incentive not to unbundle and to hold out until the mandated date arrives. Accordingly, permitting forbearance -- as Congress did in section 10(d) -- only after the full implementation of section 251(c) creates an incentive for the ILECs to comply with the requirements of section 251.

Section 251 provides CLECs with three modes of entry in order to quickly spur local competition, not to forever tie CLECs to the BOC network. CLECs need a variety of options to compete in the advanced capabilities market, as they do to compete to provide other local services. Because of the increased possibility for gamesmanship by the supplier, CLECs have a natural incentive to choose the option that minimizes their dependence on their competitor. To that end, as competition develops, CLECs will have the incentive and wherewithal to construct their own facilities.

V. THE COMMISSION DOES NOT HAVE AUTHORITY TO FORBEAR FROM THE APPLICATION OF THE REQUIREMENTS OF SECTION 251(c)

In arguing that the Commission should forbear from applying the requirements of Section

251(c) to the realm of advanced telecommunications capabilities described in Section 706 of the Act,[17] US West makes several inaccurate arguments and grossly mischaracterizes key provisions of the Act. Implicit in US West's comments is the assumption that advanced capabilities are not being deployed in a reasonable and timely manner[18] and that the BOCs are the only entities capable of providing adequate advanced telecommunications capabilities. Section 706 of the Act does not authorize the Commission to automatically release the BOCs from the competitive safeguards enacted by Congress. The relief requested is specifically forbidden by the Act and would effectively nullify the procompetitive purposes of the Act as enacted by Congress.

US West attempts to distinguish section 706 from section 10 by arguing that section 10 "deals with forbearance from regulating when competition dictates that regulation is no longer necessary to protect the public from unreasonably high rates or unreasonable discrimination," while section 706 "deals with instances where regulation is affirmatively harming the public, whether the particular market is competitive or not."[19] No matter how US West tries to interpret section 706, it cannot transform it into a deregulation provision for the BOCs. Indeed, there is no specific reference to or preference for the BOCs in section 706.

Section 706 is concerned not with how the BOCs can best innovate, but how advanced telecommunications capability can be deployed to all Americans by all entities in the telecommunications marketplace. US West, however, would have the Commission believe that

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[17] See US West Comments at 3-7.

[18] No evidence has been provided to support such a contention.

[19] See US West Comments at 5.

section 706 is a congressionally-mandated "BOC Freedom" provision that would permit the BOCs to provide in-region interLATA services under the guise of advanced telecommunications, without complying with the strict competitive requirements of sections 251(c) and 271. Section 706 in no way sets forth a preference for deregulation but instead authorizes the Commission to use several regulatory tools in a manner that promotes competition in the local markets and is consistent with the public interest. Indeed, section 706 authorizes the Commission to impose regulation where necessary and consistent with the public interest.

As MCI explained in its initial comments, section 706 of the Act is not an independent grant of forbearance authority. Any forbearance authority exercised by the Commission must comply with the strict limitations on forbearance contained in section 10. Accordingly, under section 10(d), the Commission is prohibited from forbearing from the application of "the requirements of sections 251(c) and 271 . . . until it determines that those requirements have been fully implemented." 47 U.S.C. § 160(d). Even if the Commission had the authority to grant the requested forbearance -- which it clearly does not -- granting the requested regulatory forbearance now would permit the BOCs to eviscerate the procompetitive provisions of the Act and would allow the BOCs to enter the in-region interLATA market without complying with the competitive safeguards enacted by Congress.

Any argument that section 706 overrides the forbearance limits of section 10 violates the basic principles of statutory interpretation because such an interpretation is inconsistent with the overall structure of the Act.[20] US West's contradictory reading of the phrase "regulatory

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[20] See generally Tataronowicz v. Sullivan, 959 F.2d 268, 276 (D.C. Cir. 1992) ("[C]ongressional intent can be understood only in light of the context in which Congress

forbearance" in section 706 would render sections 10, 251 and 271 of the Act meaningless.[21] Congress included the strict limitations in section 10(d) to control the types and degrees of forbearance afforded under the Act, in order to ensure that the requirements of sections 251(c) and 271 are not subverted or diminished prior to the ILECs and the BOCs meeting those statutory conditions.

US West and other BOCs have attempted to confuse the Commission by arguing that advanced telecommunications capability and any transmissions related to it create a new world of telecommunications not intended to be subject to the competitive safeguards of the Act. MCI does not find persuasive US West's argument that the term ILEC, as defined in the Act, does not apply to carriers in the realm of advanced telecommunications.[22] To illustrate its point, US West refers to the fact that Commercial Mobile Radio Service ("CMRS") providers are not considered to be LECs under the Act. Unlike incumbents, CMRS providers are not considered LECs and are explicitly exempt from the definition of the term LEC under section 3(26) of the Act. 47 U.S.C. § 153(26). Indeed, the fact that Congress carved out an explicit statutory exemption for

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enacted a statute and the policies underlying its enactment."); see also Greenpeace, Inc., v. Waste Technologies Indus., 9 F.3d 1174, 1179 (6th Cir. 1993) (holding that congressional intent cannot be discerned "by reading an isolated subsection . . . without reference to other related provisions.").

[21] In fact, if section 706 trumps all other provisions in the Act, including, as US West argues, the regulatory forbearance limitations set out in section 10, then it should trump the limitations in the pricing provisions that the 8th Circuit inferred, and the FCC should exercise its power to require cost-based pricing of xDSL-related network elements. See Iowa Utilities Bd. v. FCC, No. 96-3321, 1998 U.S. App. LEXIS 1043 (8th Cir. Jan. 22, 1998) (writ of mandamus granted); Iowa Utilities Bd. v. FCC 120 F.3d 753 (8th Cir. 1997), amended on reh'g, 1997 U.S. App. LEXIS 28652 (8th Cir. Oct. 14, 1997), cert. granted, 118 S.Ct. 879 (1998).

[22] See US West Comments at 6.

CMRS providers shows that Congress expected the procompetitive provisions to apply to "advanced" providers in the absence of any affirmative and explicit action by Congress to exempt ILECs from the category of advanced capabilities providers. The absence of any express exemption for ILECs that provide advanced capabilities confirms that these procompetitive provisions apply to them.

There is no exemption in the Act for ILECs when they are providers of "advanced telecommunications capabilities" under section 706. ILECs are deemed "ILECs" based on the fact that they provide telecommunications services over essential bottleneck facilities. The defining characteristics of a LEC are not changed simply because the technology is altered. Indeed, section 706(c)(1) states that "'advanced telecommunications capability' is defined, ***without regard to any transmission media or technology***, as a high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality ***voice***, data, graphics and video telecommunications using any technology." (Emphasis added). 47 U.S.C. § 706(c)(1).

VI. MEASURES TAKEN TO ENCOURAGE DEPLOYMENT OF ADVANCED CAPABILITIES PURSUANT TO SECTION 706 SHOULD NOT UNDERMINE THE BROADER COMPETITIVE GOALS OF THE ACT

MCI believes that APT's request is very general and would give the BOCs unjustifiable regulatory relief before their local markets are open to competition. APT suggests a host of other deregulatory measures for the BOCs in the name of innovation, such as charging ISPs access charges and changing the productivity offset factor in the price cap formula, that are the subject of other proceedings before the Commission. These issues are better dealt with in the context of the Commission's ongoing proceedings.

As a general matter, regulatory forbearance from price cap and other BOC regulations is not in the public interest. The BOCs must open their local markets to competition to deter their incentive to engage in above-cost pricing that is neither reasonable nor beneficial for consumers. The ability to charge a supracompetitive price will not lead to innovation. Innovation will follow only where pricing is competitive.

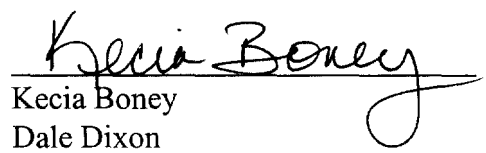
As a general matter, MCI reiterates its strong objection to any pricing or other regulatory relief for the BOCs before their markets are fully competitive. Wholesale deregulation for the BOCs to address concerns that the Commission has yet to determine even exist is inappropriate. Should the Commission determine, after its inquiry, that any action is necessary to properly implement section 706, it should consider all remedies set forth in the Act and not simply forbearance from regulation as APT and the BOCs have requested.

CONCLUSION

For the reasons set forth herein, MCI urges the Commission to reject APT's suggested approach of regulatory forbearance and, instead, adopt a procompetitive approach with a goal of determining how best to remove barriers to competitive deployment of local and advanced services.

Respectfully submitted,

MCI TELECOMMUNICATIONS CORPORATION



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CERTIFICATE OF SERVICE

I, Mellanese Farrington, hereby certify that on this 4th day of May, 1998, I served by first-class United States mail, postage prepaid, a true copy of the foregoing Reply Comments, upon the following:

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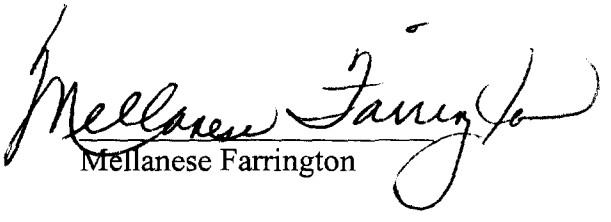

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